No. 13

In the Supreme Court of the United States

October Term, 1960

Edward J. Meyer, et al., petitioners,

v.

United States

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 17-27) are reported at 275 F. 2d 83. The findings of fact, discussion and conclusions of law of the District Court (R. 9-15) are reported at 166 F. Supp. 629.

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1959. (R. 28.) The petition for certiorari was filed on November 23, 1959, and was granted on January 11, 1960. 361 U.S. 929 (R. 29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the decedent's estate is entitled to a marital deduction under Section 812(e) of the Internal Revenue Code of 1939 with respect to a portion of the proceeds of two life insurance policies on the life of the decedent, where the proceeds were payable, under the options elected by the decedent, in monthly payments to the surviving spouse for life, but if she should die before the expiration of 20 years, thereafter the decedent's daughter would receive the payments until the 20 years elapsed.

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and Regulations involved are Section 812(e) of the 1939 Code; and Sections 81.47a and 81.47b of Treasury Regulations 105, promulgated under the 1939 Code. Other authorities involved are Senate Hearings on Reduction of Individual Income Taxes [Revenue Act of 1948], pp. 502-508; S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 26-28; and S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., pp. 2-18. The pertinent portions of these are set forth in the Appendix, *infra*, pp. 42-68.

STATEMENT

The facts as stipulated (R. 3-9) were substantially adopted by the District Court (R. 9-12) and may be summarized as follows:

Petitioners are the executors of the Estate of Albert F. Meyer, who died September 14, 1952. (R. 9.)

The total gross estate reported on the federal estate tax amounted to $313,764.46. Included in Schedule M of the estate tax return, as part of the property

passing to the surviving spouse, were the proceeds of two life insurance policies. The proceeds of each of these policies were included in the gross estate as items 3 and 8, respectively, of Schedule D of the estate tax return. Item 3 was the proceeds from an insurance policy on decedent's life issued by Northwestern Mutual Life Insurance Company, Policy No. 3212835 (originally identified as Policy No. 3056279), payable to Marion E. Meyer, wife of decedent, in the amount of $25,187.50. Item 8 was the proceeds of an insurance policy on decedent's life issued by John Hancock Mutual Life Insurance Company, Policy No. 2035894, payable to Marion E. Meyer in the amount of $5,019.60. (R. 10.)

The decedent filed a Nomination of Beneficiary and Election of Settlement Option, dated December 4, 1940, for each of the policies. The settlement option for the John Hancock policy elected by the decedent was "Option 3—Life Income." This Life Income Option provided for the payment of the proceeds of the policy in 20 annual installments in equivalent monthly payments to decedent's wife, Marion E. Meyer, if living, and thereafter during her lifetime. If the decedent's wife was not living at his death, the installments were to be paid to the decedent's daughter, Shirley A. Meyer, in the same manner. In the event of the death of the wife after becoming entitled to payment and before payment in full of the 20 annual installments, any of the 20 installments or monthly portions thereof then remaining unpaid, were to be paid, as they became payable, to the daughter. In the event of the death of the last survivor of the

decedent, either his wife or his daughter, before payment in full, the amount payable, or the commuted amount of any of the 20 annual installments or monthly portions thereof then remaining unpaid, were to be paid in one sum to the executors or administrators of such last survivor. (R. 9, 10.)

The settlement option for the Northwestern policy elected by the decedent was termed "Installments Continuous for Life. 10. Option C." This Installments Continuous for Life Option provided for the payment of the proceeds of the policy in 240 stipulated monthly minimum installments of a stated amount to Marion E. Meyer, wife of the decedent, to be continued, in case of her survival, during her lifetime. However, in the event of the death of the decedent's wife while receiving settlement under the Installments Continuous for Life Option, the decedent's daughter, Shirley A. Meyer, was to receive payment under the option in accordance with its terms as to the stipulated installments remaining unpaid, if any.[1] Each option was in effect at decedent's death. (R. 8-11.)

Decedent was survived by his wife, Marion E. Meyer, and his daughter, Shirley A. Meyer. At the

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[1] The Northwestern policy (Exhibit 1, attached to the Stipulation of Facts (R. 4)), in paragraph 6 of the Special Provisions Relating to Settlement When This Policy Becomes Payable, likewise provides that in the event of the death of the last surviving beneficiary, either the wife or the daughter, before payment of the minimum stipulated installments guaranteed, the commuted value of the minimum installments payable then remaining unpaid, was to be paid in one sum to the executors, administrators, or assigns of such last survivor.

time of decedent's death, the age of Marion E. Meyer, his surviving wife, to her nearest birthday was 42. (R. 11.)

On the basis of the calculations used by the Northwestern Mutual Life Insurance Company to determine the amount of the monthly installments, of the total proceeds in the amount of $25,187.50, the sum of $17,-956.41 was necessary to provide the monthly income in the amount of $94.71 for 20 years certain, and $7,231.09 was required to provide that monthly income thereafter for the life of the surviving spouse. (R. 11.)

On the basis of the calculations used by the John Hancock Mutual Life Insurance Company to determine the amount of the monthly installments, of the total proceeds in the amount of $5,019.60, the sum of $4,012.24 was necessary to provide the monthly income for 20 years certain, and $1,007.36 was required to provide that monthly income thereafter for the life of the surviving spouse. (R. 11.)

The Northwestern and John Hancock policies provide that benefits accruing under the settlement option and policy of insurance shall not be transferable, nor subject to commutation or encumbrances, nor to legal process, except in an action to recover for necessaries. (R. 11.)

Neither of the policies provides, and the decedent did not request, that there be any segregation of the proceeds of the policy between the amounts computable for the term certain and the amounts computable for the funding of the contingent life annuity. Each of

the policies provides that the policy and the application therefor constitute the entire contract between the parties. (R. 11.)

There is no dispute that the $17,956.41 computed as the amount required under the policy of insurance issued by the Northwestern Mutual Life Insurance Company to provide monthly payments during the 20 years certain period and the $4,012.24 computed as the amount required under the policy of insurance issued by the John Hancock Mutual Life Insurance Company to provide monthly payments during the 20 years certain period represent nondeductible "terminable interests" within the meaning of Section 812 (e)(1)(B) of the Internal Revenue Code of 1939, and no claim is made for allowance of the marital deduction with respect to the amounts of these computations. (R. 12.)

A claim for refund of estate taxes in the amount of $2,339.72, alleged by the executors to have been overpaid, was filed by the executors. This claim was based upon the contention that a total amount of $8,238.45, consisting of portions of the proceeds of each of the two life insurance policies referred to above and taken out by the decedent on his own life and computed by the insurance companies for the funding of contingent life annuities to be paid to the decedent's wife is in a category which qualifies for the marital deduction. (R. 12.)

The District Director disallowed the executors' claim for refund (R. 12) and this suit for refund in the District Court followed. The case was submitted on the stipulated facts. (R. 9.) The District Court

granted judgment for the executors, expressly following the Third Circuit's decision in *In re Reilly's Estate*, 239 F. 2d 797. (R. 12-15.) The court below (in an opinion by Judge Lumbard, joined by Judge Clark) reversed, holding that no part of the proceeds of the respective life insurance policies qualifies for the marital deduction. (R. 18-25.) Judge Waterman wrote a dissenting opinion. (R. 25-27.)

SUMMARY OF ARGUMENT

Section 812(e)(1)(A) of the Internal Revenue Code of 1939 allows for estate tax purposes, with certain limitations, a marital deduction from the gross estate of an amount equal to the value of any interest in property which passes from the decedent to his surviving spouse. However, certain terminable interests in property passing to the surviving spouse do not qualify for the deduction. Section 812(e)(1)(B) provides that there is a nondeductible terminable interest where, upon the lapse of time or the occurrence of an event or contingency, the spouse's interest in the property will terminate and an interest in such property passes or has passed from the decedent to some other person who might possess or enjoy some part of the property after the termination of the surviving spouse's interest. Compliance with the specific statutory conditions is a prerequisite to qualification for this deduction.

In this case the life insurance proceeds of each policy on the life of the decedent are not allowable as a marital deduction because after the death of the surviving wife the daughter may enjoy an interest in the proceeds which passed to her and, thus, the wife's interest is a

terminable interest within the meaning of Section 812(e)(1)(B) for which no deduction is allowable. Accordingly, no part of the life insurance proceeds qualifies for the marital deduction, and the Second Circuit has so held. The executors, relying upon the Third Circuit's contrary decision in *In re Reilly's Estate*, 239 F. 2d 797, contend that the entire proceeds of each policy were divided into two properties and that the daughter has no interest in one of them, *i.e.*, the sum computed as necessary to continue the installment payments for the remainder of the wife's life after payment of the guaranteed minimum payable under the optional settlement provisions of each policy. As we shall show, the *Reilly* decision is in conflict with the express provisions of the statute, its specific legislative history, and the pertinent Treasury Regulations.

The decedent, by his elections of the Life Income option and the Installments Continuous for Life option under the respective policies, secured a life income for his wife from the entire proceeds of each policy payable upon his death. This life income interest of the wife was an interest in the entire proceeds of each policy, and was subject to termination only on her death and was unaffected by any other factor, including the fact that the guaranted minimum payable to the daughter was limited in amount to a sum equivalent to installments payable over a 20 year period. Since there is the possibility that one other than the wife, *i.e.*, the daughter, may possess or enjoy a part of the proceeds after the wife's death, the wife's interest is a nondeductible terminable interest under the statute.

Assuming, *arguendo*, that the wife's life interest was divisible, all the resulting interests are, nevertheless, nondeductible because the entire insurance proceeds of each policy remain a single "property" within the meaning of Section 812(e). The cleavage of the entire insurance proceeds of each policy into two properties, as was done by the Third Circuit in *Reilly*, ignores the meaning of the term "property" as contemplated by Congress and as interpreted by the Treasury Regulations.

The term "property" is used in Section 812(e) in a comprehensive sense. "Property" includes all objects or rights which are susceptible of ownership and, generally, is that out of which or the proceeds of which a quantum of ownership therein may be satisfied. The quantum of ownership is only an "interest". That is, the entire life insurance proceeds usable to satisfy any "interest" created therein constitute the "property" within the purview of Section 812(e). The creation of more than one interest out of the same property does not splinter the source into multiple properties. There will not qualify for marital deduction any interest which passed to a surviving spouse in a property, in which "*an* interest" also passes or has passed to another person, who may enjoy any part of the property *after* the spouse's interest terminates. (Italics added.) If more than one interest is created in the entire proceeds of a particular life insurance policy, and an interest does pass to one other than a spouse, to split those proceeds into two properties in order to fashion a marital deduction is contrary to the statute.

The reasoning of the Third Circuit in *Reilly* is also based upon a demonstrably erroneous analysis of an illustrative example in the Senate Report.

Furthermore, the instant case falls squarely within the examples and comments in the Senate Reports, which make plain the basic legislative design that the entire proceeds of a single life insurance policy are to be treated as a single property under the statute. This is so whether or not the payment of the entire proceeds is divided into installments or whether such entire proceeds are divided into various interests. In addition, during the Senate Hearings on the marital deduction statute, the exact type of situation here involved was recognized as not being entitled to the marital deduction.

Nor is the situation affected by mathematical computations of the insurance company in calculating its actuarial risks, for these computations do not result in a division of the entire proceeds of each policy into two properties. Likewise, the contractual division of the entire proceeds payable into separate interests does not divide these proceeds into separate properties.

The statutory criteria are not directed to the quantum of the spouse's enjoyment of her interest in property. The fact that the spouse alone may enjoy her interest is immaterial, even should her interest be equivalent to the greater part of the property. No marital deduction is allowable if an interest in the same property passes to anyone else who may enjoy any part of the property after the spouse's interest terminates, by her death or otherwise.

The Treasury interpretation of the exception to

the terminable interest rule provided by Section 812(e)(1)(G) affords no support to the executors. In fact, by its enactment of an exception to the terminable interest rule, Section 812(e)(1)(G) recognized the substantial possibility that insurance proceeds payable under installment settlements of the type involved herein would be nondeductible under the rule. Of course, even under this exception, which is concededly not applicable to the instant situation since, *inter alia*, there is no power to appoint, the statutory requirements must be met.

In short, as held by the Second Circuit, the entire proceeds of each life insurance policy were a single "property" and since the daughter might possess or enjoy some part of that property after the wife's death, no part of those proceeds is entitled to the marital deduction.

ARGUMENT

No Part of the Interest of the Surviving Wife in the Proceeds of the Two Life Insurance Policies on the Life of the Decedent Qualifies for the Marital Deduction Because the Interest of the Surviving Wife is a Nondeductible Terminable Interest Under the Provisions of the Marital Deduction Statute

A. *The interest passing to a surviving spouse qualifies for the marital deduction only if the interest is not a nondeductible terminable interest*

The primary purpose of the estate tax is to tax the transfer of property at death. In broad outline, the statutory scheme is as follows: The sum of the property transferred subject to the tax is called the gross estate. The various deductions allowed by the statute are subtracted from the gross estate to get the net or taxable estate.[2] The rates of tax are applied to the net estate, and the result, after the subtraction of any allowable credits against the tax, is the final tax due. Sections 810, 811, 812 and 813 of the Internal Revenue Code of 1939. See also Sections 935-939 of the 1939 Code. This statutory scheme was retained under the Internal Revenue Code of 1954. Lowndes and Kramer, *Federal Estate and Gift Taxes* (1956), p. 8.

This is the first case in this Court involving the so-called *marital deduction.* This deduction was introduced into the estate tax law by the enactment of Section 812(e) of the Internal Revenue Code of 1939,

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[2] In Section 2051 of the 1954 Internal Revenue Code, the term "taxable estate" was substituted for the term "net estate."

Appendix, *infra*, pp. 42-45, in the Revenue Act of 1948.[3] Its purpose "is to equalize the impact of the estate tax upon married persons in community property and common law states." Lowndes and Kramer, *supra*, p. 10. Section 812(e)(1)(A) of the statute authorizes the "[a]llowance of marital deduction" in computing the net estate of a decedent in an amount equal to any interest in property which passes or has passed from the decedent to his surviving spouse.[4] But Congress has determined that not all testamentary gifts to a surviving spouse qualify for the marital deduction; in Section 812(e)(1)(B) of the statute it has expressly provided that such a deduction will not be available with respect to interests of the type designated as "Life Estate or Other Terminable Interest." "The idea behind the terminable interest rule is that in a community property state, the surviving spouse's interest in community property is not restricted or

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[3] The marital deduction provisions were introduced by committee amendment on the floor of the House. 94 Cong. Record, Part 1, pp. 919-920. Thus, the House Committee did not discuss the details of the provisions in its report, although the committee amendment adding these provisions on the floor was anticipated. H. Rep. No. 1274, 80th Cong., 2d Sess., pp. 4, 26 (1948-1 Cum. Bull. 241, 243-244, 261). A detailed and comprehensive analysis of the marital deduction provisions as ultimately enacted is contained in S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 1, 5 (1948-1 Cum. Bull. 285) and in the supplementing report, S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., pp. 1, 2 (1948-1 Cum. Bull. 331).

[4] The deduction is allowed only to the extent that the interest is included in determining the value of the gross estate. Section 812(e)(1)(H) limits the aggregate amount of the marital deduction to 50 per cent of the decedent's adjusted gross estate as defined in Section 812(e)(2). In view of the policy of the statute to accomplish equality between common law and community property jurisdictions, the marital deduction generally does not apply to community property. Section 812(e)(2(B).

qualified. * * * The terminable interest rule lies at the heart of the marital deduction." Lowndes and Kramer, *supra*, p. 386. Thus, in order for an interest passing to a surviving spouse to qualify for the marital deduction, it must not be a nondeductible "Terminable Interest" as specified in the statute.

B. *If an interest in property passes to one other than the surviving spouse and that other person may possess or enjoy any part of such property after the termination of the spouse's interest therein, the spouse's interest is a nondeductible terminable interest.*

Congress has specified that there is a nondeductible terminable interest when (1) the interest in property passing to the surviving spouse terminates upon the lapse of time or the happening of an event, (2) an interest in such property passes or has passed from the decedent without adequate consideration to one other than the spouse and (3) that other person may possess or enjoy any part of such property after termination of the spouse's interest.[5] Section 812(e)(1)(B)(i) and (ii). See Treasury Regulations 105, Section 81.47b, Appendix, *infra*, pp. 48-50; *Cunha's Estate* v. *Commissioner*, 279 F. 2d 292, 296 (C.A. 9th); *Estate of White* v. *Commissioner*, 22 T.C. 641, 645-646 (reviewed by the

[5] Likewise, there is a nondeductible terminable interest if a terminable interest is "to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust". Subparagraph (iii) of Section 812(e)(1)(B) of the 1939 Code. See Treasury Regulations 105, Section 81.47b(e), Appendix, *infra*, p. 52; S. Rep. No. 1013, Part 2, *supra*, p. 13 (1948-1 Cum. Bull. 331, 340), Appendix, *infra*, pp. 66-67.

court); Lowndes and Kramer, *Federal Estate and Gift Taxes* (1956), p. 387.

Whether any person may possess or enjoy any part of the property after the interest of the surviving spouse terminates is determined at the time of the decedent's death and it is sufficient for purposes of Section 812(e) if, by any possible circumstances under the terms of the bequest, any person may possess or enjoy any part of the property in which the surviving spouse has an interest. Treasury Regulations 105, Section 81.47b; S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., pp. 10, 12 (1948-1 Cum. Bull. 331, 338, 339), Appendix, *infra*, pp. 48, 64-65. It need not be certain that any part of the property will pass to one other than the surviving spouse; that it "may" is enough. In addition, the term "possess or enjoy" is to be broadly and comprehensively construed. S. Rep. No. 1013, Part 2, supra, p. 8 (1948-1 Cum. Bull. 331, 337), Appendix, *infra*, pp. 63-64; Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 Harv. L. Rev. 1097, 1130, note 120 (1948).

Generally speaking, special tax deductions or exemptions are regarded as matters of legislative grace. *Deputy* v. *du Pont*, 308 U.S. 488, 493; *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440. In application of this principle, the courts have required strict compliance with the specific statutory conditions of Section 812. *Shedd's Estate* v. *Commissioner*, 237 F. 2d 345, 347-348, 356-358 (C.A. 9th), certiorari denied, 352 U.S. 1024; *Cunha's Estate* v. *Commissioner*, 279 F. 2d 292, 296-298 (C.A. 9th); *Werbe's Estate* v. *United States*, 273 F. 2d 201, 205-206 (C.A. 7th); *Starrett* v. *Commis-*

sioner, 223 F. 2d 163, 165-166 (C.A. 1st); *Estate of Pipe* v. *Commissioner*, 23 T.C. 99, 103-104, affirmed, 241 F. 2d 210, 214 (C.A. 2d), certiorari denied, 355 U.S. 814; see also, *Loughridge's Estate*, 183 F. 2d 294, 301 (C.A. 10th), certiorari denied, 340 U.S. 830. The explicit provisions of Section 812(e), as correctly held by the Second Circuit (R. 17-25), compel the denial of the marital deduction as to the amounts in issue in the instant case.

C. *Since the daughter may enjoy a part of the life insurance proceeds after the wife's death, the wife's interest in the insurance proceeds of each policy is a nondeductible terminable interest and thus no part of the entire proceeds qualifies for marital deduction.*

The basic question in this case is whether the terminable interest rule of Section 812(e)(1)(B) compels the nonallowance of the entire interest of the surviving wife in the entire proceeds of two life insurance policies as a marital deduction because of the daughter's interest in the policies.

The proceeds from the two pertinent life insurance policies upon the life of the decedent were includible as part of the decedent's gross estate for estate tax purposes. The decedent had elected under the settlement options of each contract to have the respective proceeds paid to the primary beneficiary, his wife, and to the contingent beneficiary, his daughter, in the following manner:[6] The surviving wife was to receive

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[6] By his election, a decedent, as an insured, decides whether the proceeds of the particular policy will eventually qualify for the mari-

installment payments of a specific amount for her entire life. The exact monetary value of each payment was dependent upon both the age of the wife at the decedent's death and the length of the guaranteed minimum refund feature.[7] Magee, *Life Insurance* (Third ed., 1958), p. 364. The policies here provided that a minimum refund equivalent to installments for 20 years was certain. If the wife failed to survive her husband for 20 years, the installments remaining for that 20 year period were payable to the decedent's daughter, if surviving. If the daughter died while receiving the installments, payment was to be made to her estate of the commuted value of the minimum number of installment payments remaining due for the 20 year certain period. If the wife was not survived by the daughter and she died before receiving installments for 20 years, the wife's estate was to be paid the commuted value of the minimum number of installments payable. (R. 10-11.)

From the foregoing it is obvious that the daughter may possess or enjoy a part of the proceeds, by reason of the passing of an interest in the proceeds from the decedent, after the termination of the wife's interest. The executors concede, therefore, that the computed

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tal deduction because qualification depends entirely upon whether the provisions of the beneficiary endorsement meet the technical requirements of Section 812(e). Lourie, *Insurance Under the Marital Deduction When Left Under The Various Optional Modes of Settlement*, N. Y. U. Seventh Annual Institute on Federal Taxation (1949), p. 705.

[7] Of course, the longer the guarantee or term certain period, the smaller the life income payments would be. Magee, *supra*, pp. 370-371. The District Court found the monthly payments here in the case of the Northwestern policy to be $94.71. (R. 11.)

sums, to the extent calculated by each of the insurance companies for their bookkeeping convenience to provide the minimum refund measured by installments for 20 years certain, are nondeductible "terminable interests" within the meaning of Section 812(e)(1)(B) and make no claim for allowance of the marital deduction with respect to these sums. (R. 12.)

The instant controversy arises from the executors' contention that the proceeds were two properties and that the daughter had no possible interest in one of them, *i.e.*, the sum computed as necessary to provide the payments for the remainder of the wife's life after payment of the minimum amount. (Br. 7; R. 12.) The executors' position is predicated upon the Third Circuit's decision in *In re Reilly's Estate*, 239 F. 2d 797, reversing 25 T.C. 366. The Second Circuit in its opinion here has demonstrated, we believe, the fundamental error of the *Reilly* decision, and in contrast to *Reilly*, its decision is consistent with the statute and its legislative history. The Government's position, sustained by the Second Circuit, is that the possible enjoyment of a part of the insurance proceeds by the daughter after the wife's death renders the wife's interest in the insurance proceeds a nondeductible terminable interest, and prevents any part of the entire proceeds from qualifying for marital deduction.[8] This is so because neither the life interest passing to the wife nor the entire proceeds are divisible.

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[8] See Rev. Rul. 55-733, 1955-2 Cum. Bull. 388, which explains that, where insurance proceeds are to be paid to a surviving wife, with named secondary or contingent beneficiaries in the event she dies before receiving guaranteed monthly installments for 120

D. *By the mode of settlement elected, the decedent provided that, out of the entire proceeds payable upon his death under each life insurance policy, a life interest in the entire proceeds would pass to his surviving spouse*

The "interest" passing to the wife is what is deductible or nondeductible under Section 812(e), and, thus, the inquiry is, what "interest in property" has passed to the wife? The answer, we submit, is that a life interest passed to the wife by virture of each insurance contract and, as we will show, that interest was *one* interest.

It is common practice in the life insurance field for life insurance contracts to offer several optional modes of settlement for the payment of the proceeds of such insurance.[9] The common option here pertinent is the option providing for *life income* with installments guaranteed for a stipulated period. See Mowbray and Blanchard, *Insurance, Its Theory and Practice in the United States* (Fourth ed., 1955), p. 233; Harnett, *Taxation of Life Insurance* (1957), p. 112; Lourie, *supra*, p. 703.

Both contracts here provide for such a life income option, in addition to the others commonly offered. In the John Hancock contract, the option is characterized as "Option 3—Life Income." (R. 9.) In the North-

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months, the marital deduction is disallowed by reason of the terminable interest rule of Section 2056(b)(1) of the 1954 Code, even though the widow has a life expectancy of more than ten years.

[9] As one authority has noted, the willingness of the insurance companies to write these common settlement options does not always result in the greatest possible marital deduction. Harnett, *Taxation of Life Insurance* (1957), p. 42.

western contract, the option is characterized as "Installments Continuous for Life. 10. Option C." (R. 8.)

The decedent by his elections of the Life Income option in the John Hancock contract and the Installments Continuous for Life option in the Northwestern contract made firm the contractual obligation on the part of the respective company to provide a *life* income for decedent's wife. (R. 5.) At the moment of decedent's death, the insurance contract fixed the precise monthly sum his wife was entitled to receive for the rest of her life from the proceeds payable. This life income interest passing to the wife was, of course, subject to termination upon the occurrence of an event—the wife's death. No other event or contingency could affect in any way her life interest. It is the inevitable fact of her death that makes her life interest in the proceeds terminable.

But there is an additional factor, namely, that the decedent wished to provide definitively that in any event a minimum financial benefit would flow from the insurance proceeds to his beneficiaries. He did so by a utilization of the so-called stipulated number of installments provision common under this mode of settlement. That is, the minimum refund measure under each contract was 20 years of monthly installment payments. This 20 year certain minimum would be operative only if the decedent's wife did not survive him by 20 years. In that event, the 20 year certain installments would be paid, either in installments to the daughter surviving, or by a commuted payment to the estate of either the wife or the daughter, as provided. However, the wife's life interest in the proceeds is not

affected in any way by the possible payment of installments for 20 years certain. At the wife's death, her life interest ends. It ends no matter how much time has passed or how many payments have been made.

The court in *In re Reilly's Estate*, 239 F. 2d 797 (C.A. 3d), erroneously divided the life interest of the wife in the insurance proceeds into two separate interests—in terms of the present case, one an interest in installments for 20 years and the other in installments for her life remaining contingent upon survival of the 20 year period. But the wife's interest cannot properly be so divided for what she has is a life interest whether it be for one year, 20 years, or 40 years. This was recognized by the Second Circuit which, after noting the twofold division of the wife's interest by the *Reilly* decision, concluded that the wife had been granted a life estate in the insurance proceeds, with a remainder in the daughter. (R. 21-22.) The fact that "an interest" passing to the daughter from the decedent's estate is limited to a fixed number of installments possibly remaining unpaid over a 20 year certain period and that the daughter can never share in any installments thereafter obviously does not effect a change in the nature of the wife's life interest in the insurance proceeds.

The executors have agreed that "an interest" as described above passing to the daughter is sufficient under Section 812(e)(1)(B)(i) and (ii) to make the wife's interest nondeductible to the extent of the sums the insurance companies computed as necessary to provide payments over 20 years certain. (R. 12.) It is submitted that this interest passing to the daughter is

clearly sufficient to prevent the allowance of any marital deduction with regard to the entire proceeds since the terminable interest of the wife is one life interest in the proceeds of each policy. Therefore, for this reason alone the decision of the Second Circuit should be sustained.

E. *The proceeds of each life insurance policy constitute a single "property" within the meaning of Section 812(e) of the Internal Revenue Code of 1939*

Even assuming, *arguendo*, that the wife's interest in the insurance proceeds was not a life interest but rather was two separate interests, no marital deduction should be allowed because the insurance proceeds emanating from each contract are a single "property" within the meaning of the statute.

In re Reilly's Estate, *supra*, held that the insurance proceeds under each contract were divided into two separate properties. This approach is utilized by the executors because of the unquestioned fact that, if the proceeds of each policy were held to be one property, the interest which passed to the daughter and which may be enjoyed by her after the wife's death would be an "interest" sufficient to make the proceeds non-deductible under the terminable interest statute.

1. *The legislative intention was to distinguish between "property" and an "interest" in that property for marital deduction qualification purposes*

As the careful analysis made by the Second Circuit shows, Congress took pains to avoid the very type of division into various properties that the Third Circuit

made in *In re Reilly's Estate, supra,* with regard to insurance proceeds. This is evident from various statements made in the pertinent Report of the Senate Committee on Finance. The Senate Report specifically delineates the different meanings of "interest" and "property" as used in Section 812(e) as follows [10] (S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948-1 Cum. Bull. 331, 333), Appendix, *infra*, p. 60:

> The terms "interest" and "property" as used in section 812(e) have separate and distinct meanings. The term "property" is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership. The term "interest" refers to the extent of ownership, that is, to the estate or the quality and quantum of ownership by the surviving spouse or other person, of particular property. * * *

The reason for this careful distinction between the two terms is of basic significance in determining the extent to which Congress authorized deductions under the marital statute. The fundamental design used by Congress is clearly reflected in S. Rep. 1013, 80th Cong., 2d Sess., p. 28 (1948-1 Cum. Bull. 285, 305), Appendix, *infra*, pp. 57-58:

> * * * [I]t has been stated that the interest in property must pass outright to the surviving or donee spouse to qualify for the marital deduction. *This*

[10] Professor Surrey has remarked that this elaboration in the Senate Report on the necessity of distinguishing between "interest in property" and "property" apparently was in anticipation of some difficulties. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 Harv. L. Rev. 1097, 1129 (1948).

> *is intended to restrict the deduction to those cases where the decedent or donor passes to his spouse all of his interest in the property.* This will equate the decedent in the common-law State with the decedent in the community-property State who cannot by his will effect in any way the surviving spouse's interest in the community property. *Thus, a deduction will not be allowed under the amendments if the only interest given a spouse is in property in which the decedent or donor also gave an interest to someone else who may posses or enjoy the property after the donee spouse dies.* * * * [Italics added.]

After delineating the different meanings of "interest" and "property", the Committee used an illustrative example of the relationship between the two terms (S. Rep. No. 1013, Part 2, *supra*, p. 4):

> * * * [I]f the surviving spouse is specifically devised an estate for her life in a farm, the "interest" passing to her is the life estate, and the "property" in which such interest exists is the farm. Generally the property in which any person is considered as having an interest is the property out of which, or the proceeds of which, such interest may be satisfied. * * *

These quoted statements make it clear that "property" (or the proceeds of the property) as used in Section 812(e) means the object or right which is the source of the decedent's bounty and from which may be carved the interest passed. The object or right which is the source of the interests passed by the decedent

here is the entire insurance proceeds emanating respectively from the two life insurance policies. If the entire proceeds were to be paid in one lump sum, there would hardly be a question that such entire proceeds constitute one "property" within the meaning of Section 812(e). In the instant case, decedent elected one of the alternate modes of settlement with regard to the manner of payment of the entire proceeds, thereby creating interests in that property in his wife and daughter. But, in the words of Treasury Regulations 105, Section 81.47b(d), Appendix, *infra*, p. 50, here applicable, "The term 'property' refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as 'property'." Thus, the creation of more than one interest carved from the same single "property" source, *i.e.*, the entire insurance proceeds, does not, for purposes of Section 812(e), convert the source into multiple properties.

2. *The erroneous standard of the Reilly decision is founded upon a mistaken analysis of an illustrative example in the Senate Report*

The Third Circuit noted in *In re Reilly's Estate*, *supra*, p. 799, that Congress had generally defined the term "property" as "used in a comprehensive sense and includes all objects or rights which are susceptible of ownership." S. Rep. No. 1013, Part 2, *supra*, p. 4. The Third Circuit also recognized that Congress had used the term "interest" to refer to the extent of ownership of a particular property, and that since interest is the extent of ownership, it may encompass the entire

property. But the underlying error in *In re Reilly's Estate, supra,* lies in the conclusion that (239 F. 2d, p. 799) "a terminable *interest* may be subdivided into *interests,* each of which is separate *property* for purposes of the terminable interest rule." (Italics added.) This standard used by the Third Circuit is based upon an erroneous analysis of an illustrative example in S. Rep. No. 1013, Part 2, *supra,* p. 12 (quoted in footnote 5, p. 799 of the *Reilly* decision, *supra*), which is as follows:

> In the case of certain property which is terminable, a marital deduction may be allowed, even though clause (i) applies, as long as clause (ii) does not apply. Thus, if the decedent bequeaths all the interest he ever had in a patent to his wife and daughter as tenants in common, the marital deduction is allowed with respect to the interest of the wife in the patent. If, however, the patent were bequeathed to them for their joint lives and then to the survivor, the marital deduction would not be allowed.

The Second Circuit, expressly disagreeing with the Third Circuit's reliance on this example, stated that in no way was the example inconsistent with the view that the patent was a single property nor, conversely, did it support the view that the patent became two separate properties by virtue of the gift. (R. 23-24.) Rather, the Congressional comment states, in effect, that in the case of certain "property" which is terminable a marital deduction may possibly be allowed as to the wife's *interest* when the *property* is subdivided into *interests,* each of which is a separate in-

terest for purposes of the terminable interest-rule. When the decedent bequeathed the entire interest he had in the "property", the patent, to the wife and daughter as tenants in common, he had bequeathed a terminable interest to the wife and an interest to the daughter (which also happened to be terminable). As stated, clause (i) applies; that is, "an interest in such property" had passed to one other than the surviving spouse, the daughter. But, as is expressly noted in the comment, clause (ii), the second condition necessary to make "the interest of the wife in the patent" a nondeductible terminable interest, does not apply. This is so because the daughter will never "possess or enjoy any part of such property" *after* termination of the wife's interest. This aspect of the Congressional example has been incorporated and amplified in an example in the governing Regulations. Treasury Regulations 105, Section 81.47b(d), example (viii), Appendix, *infra*, pp. 51-52. It is evident that in this circumstance, of the two interests passing, the one interest which passed to the surviving spouse was allowable as a marital deduction, and, what is vital here, without the patent being divided into separate properties. That is, the patent was one property in which a deductible interest passed to the wife.

But if the decedent's entire interest in that "property," the patent, was bequeathed to the wife and the daughter for their joint lives and then to the survivor, "the interest of the wife in the patent" would be a nondeductible terminable interest. This is so because clause (ii) would apply since the daughter might possess or enjoy her interest *after* the termination of the wife's

interest by death. Here too, the governing Regulations have incorporated and amplified this particular aspect in an example. Treasury Regulations 105, Section 81.47b(d), example (v), Appendix, *infra*, p. 51. Again the patent remains one property within the meaning of the statute although one of the interests into which it is divided is a nondeductible terminable interest. The standard which the Third Circuit should have applied is that a terminable *property* may be subdivided into *interests*, each of which is a separate *interest* for purposes of the terminable interest rule. This is quite different from saying that a single "property" may be subdivided into several properties, as the executors here seek to do.

3. *The unambiguous examples and comments in the Senate Report demonstrate that the entire proceeds of each life insurance policy constitute a single "property" regardless of how the proceeds are divided into interests or if payable in installments*

Despite the failure of *In re Reilly's Estate, supra,* to carefully draw a distinction between the interest and the property, the Congressional intention was to do so. Examination of the Senate Report discloses, as the Second Circuit concluded (R. 23), that the instant case falls squarely within the unambiguous examples given in those reports. In S. Rep. No. 1013, Part 2, *supra*, p. 12, Appendix, *infra,* pp. 65-66, the committee stated that the same principles exhibited in the patent example discussed above apply in the case of insurance proceeds and annuity contracts, includible

in a decedent's gross estate, and proceeded to illustrate that fact as follows:

> Example (1).—The *entire proceeds of an insurance policy* on the life of the decedent are payable to the surviving spouse and the value of such proceeds is included in determining the value of the gross estate. *A marital deduction is allowed* with respect to the value of the proceeds because no person other than the surviving spouse has *an interest in the proceeds. The result will be the same whether such proceeds are payable* in a lump sum; are payable *in installments* to the surviving spouse, her heirs, or assigns, for a term; or are payable *to the surviving spouse for her life with no refund of the undistributed proceeds or with such a refund to her estate.* * * * [Italics added.]

Thus, in this illuminating example, the committee makes clear that the entire proceeds of a single insurance policy on a decedent's life constitute the "property" in which the surviving spouse has an "interest." Or, as put by the Second Circuit, it is plain that "proceeds" is identical with "property" in such a situation. (R. 22.) The authoritative example also illustrates the fact that if the entire proceeds derived from a life insurance policy are payable under a settlement option, the proceeds qualify for the marital deduction if payable in installments to the surviving spouse for life, with no refund of the undistributed proceeds, or with such a refund or remainder payable to her estate. Lourie, *supra*, p. 706; Harnett, *supra*, p. 112; Lowndes and Kramer, *supra*, p. 421. But if the settlement

option of a policy provides only a life income to the wife and then a remainder to secondary beneficiaries, the proceeds thereunder are disqualified under the terminable interest rule. Harnett, *supra*, pp. 112-113. The reason, of course, is that the entire proceeds of a particular insurance policy constitute a single "property" under Section 812(e).

This is clear from the further explanation in the Senate Report that the wife's interest in an annuity contract with a refund feature will qualify for the marital deduction if the refund is made to her estate; but if, on the other hand, upon her death, the payments continue to another person, no marital deduction is allowable. The Second Circuit observed (R. 22) that this annuity example, if it is possible, even more clearly defines the contract as a single property. S. Rep. No. 1013, Part 2, *supra*, pp. 12-13, states, Appendix, *infra*, p. 66.

> Example (2).—The decedent during his lifetime purchased an annuity contract under which the annuity was payable during his life and then to his spouse during her life if she survived him. The value of the *interest* of decedent's surviving spouse *in such contract* at the death of the decedent is included in determining the value of his gross estate. *A marital deduction is allowed* with respect to the value of such interest so passing to the decedent's surviving spouse *inasmuch as no other person has an interest in the contract.* If upon the death of the surviving spouse the annuity payments were to continue for a term to her estate, or the undistributed portion thereof was to be paid to her estate, the deduction is nevertheless allowable with respect to such entire interest. If, however, *upon*

the death of the surviving spouse, the payments are to *continue to another person* (not through her estate) or the undistributed fund is to be paid to such other person, *no marital deduction is allowable inasmuch as an interest passed from the decedent to such other person.* [Italics added.]

With unmistakable clarity, therefore, the Committee report shows that life insurance proceeds under one policy and proceeds of an annuity contract likewise constitute one "property" within the meaning of Section 812(e), regardless of how the proceeds are divided into interests or if payable in installments.

4. *During the Senate Hearings on the marital deduction statute, the exact type of situation here involved was recognized as not entitled to the marital deduction*

In an attempt to avoid the clear meaning of the statutory language and its legislative history, the executors state (Br. 12): "Perhaps, inadvertently, but nevertheless actually, the Congress and the Committee neglected to consider the *exact* type of situation that is involved in this case." (Italics added.) The exact type of situation here involved was brought to the attention of the Congress and the Committee and was, in fact, recognized as a situation not entitled to marital deduction. Mr. Judd C. Benson, Chairman of the Committee on Federal Law and Legislation for the National Association of Life Underwriters, appeared before the Senate Committee on Finance in the Hearings upon the Revenue Act of 1948. Mr. Benson stated that for the record he would like "to have the committee understand this one situation so that it cannot be said after-

ward that the bill was passed without a clear understanding." Senate Hearings on Reduction of Individual Incomes Taxes [Revenue Act of 1948], p. 506, Appendix, *infra*, p. 53. Mr. Benson noted that a high percentage of death claim funds were left with companies under the optional method of settlement whereby the companies would pay the proceeds in installments to the beneficiaries. Mr. Benson then described as characteristic the situation here involved, income to the wife for 20 years certain and for life thereafter; in the event of her death during the certain period, the remaining installments to the surviving children, otherwise to her estate. Senate Hearings, *supra*, pp. 506-507, Appendix, *infra*, p. 54. Completely in accord with the Second Circuit decision and the Government's position, Mr. Benson concluded that an insured so directing his children as contingent beneficiaries would have to forego the marital deduction. Senate Hearings, *supra*, p. 507, Appendix, *infra*, pp. 54-55. Mr. Benson's statements before the Senate Committee demonstrate that even under Section 812(e)(1)(G) of the 1939 Code,[11] policies with the characteristics of those under review would not qualify for marital deduction. Surrey, *supra*, p. 1151. In

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[11] The bill passed by the House as reported to the Senate (Senate Hearings, *supra*, pp. 7-8) did not contain subparagraph (G) of Section 812(e)(1). S. Rep. No. 1013, Part 2, *supra*, p. 18 (1948-1 Cum. Bull. pp. 331, 343). This exception to the terminable interest provisions of Section 812(e)(1)(B) was added by the Senate Committee after the hearings for the purpose of allowing the marital deduction in the case of proceeds of life insurance when the surviving spouse is entitled to installments of the proceeds and has the power to appoint all amounts payable under the contract similar to the power of appointment possessed by the surviving spouse in the case of a trust to which Section 812(e)(1)(F) applies. S. Rep. No. 1013, Part 2, p. 18 (1948-1 Cum. Bull. pp. 331, 343-344).

short, as Mr. Benson foresaw, if the policyholder wanted his insurance to be subject to the marital deduction, he would have to forego the designation of his children as contingent beneficiaries, although under subparagraph (G) he might give that power to his wife. Senate Hearings, *supra*, p. 507, Appendix, *infra*, pp. 55-56.

5. *Neither mathematical computations on the part of an insurance company nor the provision in a particular contract that the proceeds may be payable to more than one person divides the proceeds into two properties*

Basically, the executors' argument is that there are two properties, from one of which flows a nondeductible terminable interest and from the other of which flows an interest allowable as a marital deduction. This argument is grounded on the action of the insurance companies which have calculated that a portion of the proceeds which they received (the amount of the policies which would be payable at death if no option were exercised) may be computed as necessary to provide the minimum refund of the proceeds, *i.e.*, the flat sum payable over a 20 year period, and another calculable portion as necessary to provide the payments which would have to be made if the widow continued to live after the minimum refund had been made. (R. 11.) There was no actual segregation of policy proceeds; the computations were mere actuarial or bookkeeping calculations and entries. Of course, such computations do not avoid the principle that the total assets of the insured are available without division to meet the total liabilities. Mowbray and Blanchard, *supra*, p. 358. And

it has been cautioned that optional modes of settlements under life insurance policies are to be distinguished from insurance trusts: the settlement options are purely contractual matters derived from the consensus of the parties and are not thought to create a trust *res*. Harnett, *Taxation of Life Insurance* (1957), pp. 35, 42. In fact, an actuarial division as described is always capable of being made in the case of any refundable annuity. Notwithstanding that such a division could be made, the Senate Report makes it clear that only a single property is involved.

Assuming *arguendo* that, had the contract provided for the actual segregation of separate funds, they could then have been considered separate properties within the meaning of Section 812(e)(1)(B)—which is open to doubt—here in fact the contracts plainly reveal that no such segregation was provided for. On the contrary it was found by the District Court, as stipulated, that neither of the policies provides, and the decedent did not request, that there be any segregation of the proceeds of the policy between the amounts computable for the term certain and the amounts computable for the funding of the remaining part of the life annuity. Moreover, both of the policies provide that the policy and the application therefor constitute the entire contract between the parties. (R. 11.) The arguments made in the executors' brief (p. 8) and contained in the dissenting opinion (R. 27) addressed to hypothetical agreements are thus not pertinent here. The court below correctly rejected the view that what might have been accomplished at the outset, but was not, ought nevertheless to be regarded as having been done. See

also *Hoffenberg* v. *Commissioner*, 223 F. 2d 470 (C.A. 2d), affirming *per curiam* on the opinion of the Tax Court below, 22 T.C. 1185; *Shedd's Estate* v. *Commissioner, supra.*

The Third Circuit in *In re Reilly's Estate, supra,* proceeding upon the erroneous standard discussed above, had divided the one property into two, relating the so-called properties to the interests, not, as does the statute, the interests to a property. That decision ignored the statutory delimitation between the interest passing to a surviving spouse and an interest passing to a person other than the surviving spouse, and divided the interests, not in those terms, but as if the interests were determined by the risks and obligations of the two insurance companies. The decedent, by his election under each policy simply delineated the *interests* of the surviving spouse and the person other than such surviving spouse *in the proceeds* if the distinction between the terms "interests" and "property" as used in Section 812(e) is to be meaningful as Congress intended. Upon maturity, the entire proceeds from each contract constituted one "property" under Section 812(e) because the mere division of interests between the wife and daughter does not compel a division of the proceeds into two properties and to do so would be manifestly contrary to the statute.

F. *The fact that the spouse's interest may not be enjoyed by anyone else is immaterial if an interest in the same property passed to another person who may enjoy any part of the property after the spouse's death*

The executors seem to think that Congress intended to give a blanket marital deduction to any interest in the property passing to a surviving spouse which cannot be enjoyed by anyone else. (Br. 8-9.) But this assertion disregards the legislative history. Congress acknowledged that complete equalization of the estate taxes between common law and community property jurisdictions could not be achieved because of the inherent differences between noncommunity property and community property. S. Rep. No. 1013, *supra*, p. 27 (1948-1 Cum. Bull. 285, 305); Appendix, *infra*, p. 57. The Report expressly stated that the new marital deduction provisions "will result in equality in the important situations." The basic premise underlying these marital deduction provisions is that the deduction is restricted to those cases where the decedent passes to his spouse all of his interest in the property. S. Rep. No. 1013, *supra*, p. 28. Based upon this fundamental premise, the Report stated that a deduction would not be allowed "if the only interest given a spouse is in property in which the decedent or donor also gave an interest to someone else who may possess or enjoy the property after the donee spouse dies."

Furthermore, merely because the wife might be the only one who could benefit from the bulk of the proceeds does not mean that her interest qualifies for the marital

deduction. Under the express terms of the statute the wife could receive the entire benefit of a terminable interest, otherwise deductible, and it would still be disqualified if it were acquired for her by the executors pursuant to the direction of the decedent. Section 812 (e)(1)(B)(iii). See footnote 5, *supra*, p. 14. Thus, in those circumstances, even though no person other than the wife has an interest in the property, her interest will fail to qualify for the marital deduction. 2 Beveridge, *Law of Federal Estate Taxation* (1956), Section 14.03; Lowndes and Kramer, *supra*, pp. 387-388.

Another example of a nondeductible terminable interest even though the wife will enjoy the bulk of the property is that quoted (R. 21) by the Second Circuit from the Senate Committee Report. Despite the fact that the principal value of Blackacre was a coal mine which was expected to be exhausted during the surviving wife's life, the example makes it clear that nevertheless both the wife and the remainderman, X, have an interest in the property. S. Rep. No. 1013, Part 2, *supra*, p. 8 (1948-1 Cum. Bull. 331, 336), Appendix, *infra*, p. 62. Since the remainderman may possess or enjoy part of the property after the wife's death, the wife's interest does not qualify for the marital deduction.

G. *Treasury interpretation of the exception to the terminable interest rule provided by Section 812(e)(1)(G) affords the executors no support.*

Section 812(e)(1)(G) of the Internal Revenue Code of 1939, Appendix, *infra*,[12] pp. 44-45, creates a special exception to the terminable interest rule where, *inter alia*, the surviving spouse is given installments of the proceeds of an insurance policy during life with power of appointment over the residue of the proceeds. Although it cannot be contended that this subsection has any application here, the circumstance that Congress considered it necessary to enact such a special provision supports the Government's position. The inference is that Congress was aware that under installment modes of settlement insurance proceeds might be nondeductible under the terminable interest rule. This provision is similar to that enacted in Section 812(e)(1)(F), Appendix, *infra*, pp. 43-44, covering trusts with power of appointment in the surviving spouse.[13] S. Rep. No. 1013, Part 2, *supra*, p. 18, Appendix, *infra*, p. 68. Under the terms of these exceptions the statutory requirements must also be satisfied. Lourie, *supra*, p. 707; Surrey, *supra*, pp. 1135-1136.

[12] Reference is to the provision, as amended by Joint Resolution of July 1, 1948, c. 789, 62 Stat. 1214, which as amended superseded the original provision.

[13] In commenting upon the similar provision in Section 812(e)(1)(F), the Congressional Report notes that those provisions have the effect of allowing a marital deduction with respect to the value of property transferred in trust by or at the direction of the decedent where the surviving spouse, by reason of her right to the income and the power of appointment, is the virtual owner of the property. S. Rep. No. 1013, Part 2, *supra*, p. 16 (1948-1 Cum. Bull. 331, 342), Appendix, *infra*, pp. 67-68. The same principle would hold true for the insurance exception.

The court below was not persuaded by the supposed analogy to Section 812(e)(1)(G) which the Third Circuit had found in *Reilly*. (R. 24-25.) In particular the Third Circuit noted (239 F. 2d, p. 800) that the Treasury Regulations construing Section 812(e)(1)(G), namely, Regulations 105, Section 81.47a(d), Appendix *infra*, pp. 47-48, afford an example contemplating the division of insurance proceeds into separate funds held by the insurer. But, as the opinion below stated (R. 24)—

> * * * [I]t cannot be said that the Regulation contemplates that the resulting funds may be considered to be separate properties. It is perfectly consistent with the Regulation that it applies to an instance, such as that of a tenancy in common between the surviving spouse and another, in which although two interests are thus created in the single property, the wife's interest, because of §812(e)(1)(G), is not disqualified. For example, if the surviving spouse received a life estate in one-half the proceeds with a power to appoint the remainder, and another person received one-half outright, the wife's interest would qualify if the life estate and the power met the requirements of §812 (e)(1)(G), while without (G) it may be assumed that it would not.

In any event, this Regulation interprets a special exception to the terminable interest rule, not here governing, and where the statute in subparagraph (G) conditions the granting of the exception for powers of appointment on the fulfillment of special requirements, not here

present, such as for example payments to the surviving spouse under the option must commence not later than 13 months after the decedent's death. At the most, reference to Section 812(e)(1)(G) is merely by way of analogy, while the direct evidence sustaining the Government's position under the governing Section 812(e)-(1)(B) is full and convincing.

In summation, we submit that the Second Circuit properly concluded that *In re Reilly's Estate, supra,* was incorrect. The provisions of the Committee Report reflecting the legislative purpose, as well as the Treasury Regulations interpreting the statute, stand diametrically opposed to the approach adopted in *Reilly.* In allegedly accomplishing "the (marital) deduction's remedial objective" (p. 801), the Third Circuit failed to apply the meaning of the term "property" as clearly illustrated in the Senate Report. In so doing, that court fell short of giving effect to the manifest purpose of Section 812(e)(1)(B). The Second Circuit, on the contrary, reversing the trial court, correctly held that no part of the life insurance proceeds qualified for marital deduction.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1939:

Sec. 812. Net Estate.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

*   *   *   *   *

(e) [as added by Sec. 361(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*

(1) *Allowance of marital deduction.*

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

* * * * *

(F) *Trust With Power Of Appointment In Surviving Spouse.*—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust his surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(G) [as amended by Joint Resolution of July 1, 1948, c. 789, 62 Stat. 1214] *Life Insurance or Annuity Payments With Power of Appointment in Surviving Spouse.*—In the case of an interest in property passing from the decedent consisting of proceeds under a life insurance, endowment, or annuity contract, if under the terms of the contract such proceeds are payable in installments or are held by the insurer subject to an agreement to pay interest thereon (whether the proceeds, upon the termination of any interest payments, are payable in a lump sum or in annual or more frequent installments), and such installment or interest payments are payable annually or at more frequent intervals, commencing not later than thirteen months after the decedent's death, and all amounts payable during the life of the surviving spouse are payable only to such spouse, and such spouse has the power to appoint all amounts payable under such contract (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), with no power in any other person to appoint to any person other than the surviving spouse any part of the amounts payable under such contract—

(i) such proceeds shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of such proceeds shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall be applicable only if, under the terms of the contract, such power in the surviving spouse to appoint, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

Sec. 81.47a [as added by T.D. 5699, 1949-1 Cum. Bull. 181] *Bequests, Etc., to Surviving Spouse.*—(a) *Allowance of marital deduction.*—In the case of the estate of a citizen or resident of the United States dying after December 31, 1947, there may be deducted the value of any property interest (except as otherwise provided in section 81.47b and 81.47d) which passed from the decedent to his surviving spouse. Such deduction is hereinafter referred to as the "marital deduction." * * *

In order to obtain the marital deduction with respect to any property interest the executor must establish the following facts:

(1) That the decedent was survived by his spouse;

(2) That such property interest passed from the decedent to such spouse (see paragraphs (b) to (g), inclusive, of this section);

(3) That such property interest is a "deductible interest" (see section 81.47b);

(4) The value of such property interest (see Section 81.47e); and

(5) The value of the "adjusted gross estate" (see Section 81.47d).

* * * * *

(b) *Definitions.*—(1) *Passed from the decedent.*—As used in this and the three succeeding sections, the expressions "passed from the decedent," "passed from the decedent to his surviving spouse," and "passed from the decedent to a person other than his surviving spouse," have the meanings stated in this paragraph. Except as otherwise indicated in subparagraphs (2) and (3) of this paragraph, the following rules are applicable in determining the person to whom any property interest "passed from the decedent";

* * * * *

(iv) In the case of insurance upon the life of the decedent, the proceeds are considered as having passed from the decedent to the person who, at the time of the decedent's death, was entitled to receive such proceeds.

* * * * *

(2) *Passed from the decedent to his surviving spouse.*—In general, the definition stated in subparagraph (1) of this paragraph is applicable in determining the property interest which "passed from the decedent to his surviving spouse." Special rules are provided, however, in the case of certain trusts with power of appointment in the surviving spouse and in the case of proceeds held by the insurer under a life insurance, endowment, or annuity contract, with

power of appointment in the surviving spouse. (As to such rules, see paragraphs (c) and (d) of this section.) * * *

* * * * *

The following are given as illustrative: * * * (iii) proceeds of insurance upon the life of H are considered as having passed from H to W if the terms of the contract meet the requirements of paragraph (d) of this section, or if under the terms of the contract the proceeds are payable to W in a lump sum, or are payable in installments to W for life and after her death any remaining installments are payable to her estate; or if interest on the proceeds is payable to W for life and upon her death the principal amount is payable to her estate. * * *

* * * * *

(d) *Proceeds held by the insurer under a life insurance, endowment, or annuity contract, with power of appointment in surviving spouse.*—Section 812(e)(1)(G) provides a special rule in the case of a property interest which passed from the decedent in the form of proceeds held by the insurer under the terms of a life insurance, endowment, or annuity contract which satisfy the five conditions hereinafter stated. With respect to such proceeds, the expression "passed from the decedent to his surviving spouse" embraces not only the interest of such spouse under the contract but also the interest thereunder subject to her power to appoint. The five conditions which must be satisfied by the terms of the contract are as follows:

(1) The proceeds must be held by the insurer subject to an agreement either to pay the proceeds in installments, or to pay interest thereon, with all

such amounts payable during the life of the surviving spouse payable only to her.

(2) Such installments or interest must be payable annually, or more frequently, commencing not later than 13 months after the decedent's death.

(3) The surviving spouse must have the power, exercisable in favor of herself or of her estate, to appoint all amounts so held by the insurer.

(4) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The amounts payable under such contract must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse.

If the interest of the surviving spouse under a life insurance, endowment, or annuity contract is in proceeds held by the insurer which do not, however, represent the entire amount payable under such contract, the provisions of section 812(e)(1)(G) nevertheless apply to such proceeds so held to which all five of the above conditions apply. For example, an insurance contract on the decedent's life may provide for payment of the proceeds into two funds to be held by the insurer. In such case, if all five of the above conditions are satisfied with respect to all amounts payable into one such fund, then the special rule of section 812(e)(1)(G) is applicable to the proceeds held in such fund.

* * * * *

Sec. 81.47b [as added by T.D. 5699, *supra*] *Nondeductible Interests.*—(a) *General.*—The property interests which passed from the decedent to his sur-

viving spouse (as set forth in Section 81.47a) fall within two general categories: (1) Those with respect to which the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. Such categories are hereinafter referred to as "deductible interests" and "nondeductible interests," respectively. As to the several classes of "nondeductible interests" see paragraphs (b) to (f), inclusive, of this section. Subject to the limitation set forth in Section 81.47d, the marital deduction is equal in amount to the aggregate value of the "deductible interests," that is, the property interests which passed from the decedent to his surviving spouse and do not fall within any of the classes described in such paragraphs (b) to (f).

* * * * *

(d) *Interest in property which another person may possess or enjoy.*—Section 812(e)(1)(B) provides that no marital deduction shall be allowed with respect to certain property interests (referred to generally as "terminable interests") which passed from the decedent to his surviving spouse, in case—

(1) An interest in the same property passed at any time (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such spouse (or the estate of such spouse); and

(2) By reason thereof, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse.

The foregoing provision is applicable only where interests in the same property passed from the de-

cedent both to his surviving spouse, and to some other person (for less than an adequate and full consideration in money or money's worth), and is applicable irrespective of whether both such interests passed from the decedent at the same time or under the same instrument. Under such circumstances, if the other person to whom an interest passed may, by reason thereof, possess or enjoy any part of the property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse, the latter interest is a "nondeductible interest." As to the meaning of the term "passed from the decedent to a person other than his surviving spouse," see paragraph (b) of Section 81.47a.

In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property," as such term is used in Section 812(e), and an "interest in property." The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property."

* * * * *

The term "person other than his surviving spouse" includes the possible unascertained takers of a property interest, as, for example, the members of a class to be ascertained in the future * * *. Whether there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.

In the following examples it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse was not for an adequate and full consideration in money or money's worth:

* * * * *

(iv) H during his lifetime purchased an annuity contract providing for payments to himsel for life and then to W for life if she should survive him. Upon the death of the survivor of H and W, the excess, if any, of the cost of the contract over the annuity payments theretofore made was to be funded to A. The interest which passed from H to W is a "nondeductible interest" since A may possess or enjoy a part of the property following the termination of the interest of W. If, however, the contract provided for no refund upon the death of the survivor of H and W, or provided that any refund was to go to the estate of the survivor, then the interest which passed from H to W is (to the extent it is included in H's gross estate) a "deductible interest."

(v) H devised property to W and A as joint tenants with right of survivorship. The interest which passed from H to W is a "nondeductible interest" since, if the tenancy is not severed and A survives W, the interest of W will terminate and A will continue to possess or enjoy the property.

* * * * *

(viii) H bequeathed a patent to W and A as tenants in common. In this case, the interest of W will terminate upon the expiration of the term of the patent, but possession or enjoyment of the property by A must necessarily cease at the same time.

Therefore, since A's possession or enjoyment cannot outlast the termination of W's interest, the latter is a "deductible interest."

* * * * *

(e) *Terminable interest to be acquired by executor or trustee.*— Section 812(e)(1)(B) also provides that no marital deduction may be taken with respect to a life estate or other "terminable interest" which is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by a trustee. Other examples of "terminable interests" are an annuity, an estate for years, a patent, and a copyright. Section 812(e)(1)(B) provides that a property interest shall not be considered a "terminable interest" merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

The foregoing provision is applicable only with respect to any property interest which the decedent directed the executor or a trustee to expend, subsequently to his death, in the acquisition of a life estate, annuity, or other "terminable interest" for his surviving spouse. In such a case the property interest which is to be so expended is a "nondeductible interest." The foregoing provision is not applicable, however, in the case of a general authorization to reinvest property, whereunder the executor or trustee may acquire either "terminable interests" or other property interests.

Example. A decedent bequeathed $100,000 to his wife, subject to a direction to his executor to use such bequest for the purchase of an annuity for the wife. The bequest is of a "nondeductible interest."

* * * * *

Senate Hearings before the Committee on Finance, on Reduction of Individual Income Taxes [Revenue Act of 1948]:

[p. 502]

Statement of Judd C. Benson, Chairman of the Committee on Federal Law and Legislation, National Association of Life Underwriters, Cincinnati, Ohio

MR. BENSON: I am Judd C. Benson, Cincinnati, Ohio. I am general agent for the Union Central Life Insurance Co. in Cincinnati, Ohio, and my appearance here is as chairman of the committee on Federal law and legislation for the National Association of Life Underwriters.

Mr. Chairman and gentlemen, to briefly identify my purpose, our association is the Association of Life Insurance Agents—the people who sell insurance to policyholders. I do not think our numbers are technically significant. We have about 52,500.

We are located throughout the country, and we are the direct point of contact between the companies and the policyholders.

I should like to establish this fact at the outset, and that is: So far as the bill H. R. 4790 is concerned, as agents, I think we have no particular comment to make one way or another.

I think there are some things which are of interest to our policyholders. So may I say that my representation here is strictly on behalf of our clients in this particular instance.

* * * * *

[p. 505]

MR. BENSON. Now, we get over into the estate-tax angle.

* * * * *

[p. 506]

I would like for the record to have the committee understand this one situation so that it cannot be said afterward that the bill was passed without a clear understanding.

The concept of the community-property principle, of course, is that the marital deductions shall be allowed only in the event that the property passes clearly and cleanly to the wife and is subject to her subsequent disposition.

Last year, out of $1,336,000,000 of death claims, 43 percent of the funds were left with the company under the so-called optional method of settlement, which is to say the companies were going to pay the proceeds out in installments to the beneficiaries.

Characteristically, those beneficiaries state that the primary beneficiary will leave the income for 10, 15, or 20 years certain and for life thereafter, and then they go on to recite that in the event of her death [p. 507] during a certain period, the remaining installments will go to the surviving children of the insured and his spouse, if any. Otherwise to her estate.

I would just like to know in principle—it is all right, but what we are going to have to do now is to make life insurance eligible for the marital deduction, we are going to have to go back and tear down all of those provisions which the insured have made, and we are going to have to make them read this way: That the proceeds shall be payable to the wife, 10, 15 or 20 years certain, and for life thereafter, but in the event of her death, it will not be payable to the surviving children but to her estate in order to give her the right to direct those proceeds.

There is this practical position. Some of the companies will allow the primary beneficiary to come in and elect for her children if she so wishes, appoint them as the contingent beneficiaries, but, of course, whether she does or not, it is up to her, and the husband, of course, will have no control.

There is not a thing in the world, Mr. Chairman, where it is inconsistent, but I do not want to appear here to represent our policyholders and not have the members of this committee clearly understand that situation will occur.

I am not going to ask that any correction be made in it because we have a very definite policy that we will not seek on behalf of life insurance treatment other than accorded to other forms of property.

I do not know whether you have any questions you want to ask; whether you think it is of any very grave importance.

THE CHAIRMAN. I think it is obvious that you consider of grave importance, and I think it is obvious that the staff should have the opportunity to make its estimate of the importance of it and the relation to what we may do here.

Therefore, my practical suggestion, again, is to keep in close touch with the staff.

MR. BENSON. I have gone over that very carefully with the staff, and, shall I say this: I have reason to believe that the bill which finally comes to you under this drafting will make it necessary for us to go back and see those policyholders, explain the whole situation to them, and tell them if they want the insurance to be included in the gross estate and subject to the marital deduction, they will have to give up the designation of their children as contingent beneficiaries.

Probably the real serious part of the thing is where

these children are minors and where that continuous income during their minority is really the backbone, you might say, of their particular income.

Senator George. You mean the full power of appointment must be left in the first beneficiary?

Mr. Benson. That is right, it must.

Senator George. If that is done, you will not have any difficulties, will you?

Mr. Benson. No. The only trouble will be we will probably find a man out here some place who will say, "Well, I do not know whether I want to leave it up to my wife to decide whether it shall go to the children or whether she shall make some other direction of it."

Then, of course, he will just have to decide. It is all right. He will have to decide whether, in order to direct his children as a contingent beneficiary, he will just have to forego the marital deduction.

[p. 508]

We are not quarreling about it. I think it was reasonable that it be in the record.

The Chairman. You have it in the record, I think, very thoroughly, and you brought it to the attention of Mr. Stam.

Mr. Stam will necessarily have to discuss it with us when we get into executive session.

So I do not think your point will be lost sight of.

Mr. Benson. That is all I have.

I appreciate the opportunity of appearing.

The Chairman. Mr. Stanley, will you take special pains, please, to see that Mr. Stam is acquainted with this particular part of the record.

Mr. Stanley. Yes, sir:

* * * * *

S. Rep. No. 1013, 80th Cong. 2d Sess., pp. 26-28 (1948-1 Cum. Bull. 285, 303, 305-306):

[p. 26]

B. The Estate and Gift Taxes

[p. 27]

* * * * *

With the repeal of the 1942 amendments your committee recommends estate and gift tax splitting which is similar in its effects to the splitting of the income tax provided for in this bill. It is recognized that complete equalization of the estate and gift taxes cannot be achieved because of the inherent differences between community property and noncommunity property. However, the new provisions will result in equality in the important situations.

Under the estate-tax provision of your committee's bill a decedent spouse is allowed a marital deduction from his gross estate in the amount of the value of all interests in property passing outright from the decedent to the surviving spouse by way of bequest, devise, transfer, right of survivorship in jointly held property, etc. * * *

* * * * *

[p. 28]

In the preceding paragraphs it has been stated that the interest in property must pass outright to the surviving or donee spouse to qualify for the marital deduction. This is intended to restrict the deduction to those cases where the decedent or donor passes to his spouse all of his interest in the property. This will equate the decedent in the common-law State with the decedent in the community-property State who cannot by his will effect in any way the surviving spouse's interest in the community property. Thus, a deduction will not be allowed under the amend-

ments if the only interest given a spouse is in property in which the decedent or donor also gave an interest to someone else who may possess or enjoy the property after the donee spouse dies. However, if the only interest the husband has in the property is a terminable interest, such as a lease, and he gives his wife his entire interest in the property, then the deduction is permitted.

Among the exceptions to this rule is the recognition of one of the customary modes of transfer of property in common-law States. The deduction is applicable where the decedent or donor creates a trust, the income of which the beneficiary or donee spouse is entitled to for his life, with a taxable power of appointment over the corpus of such trust in the spouse. Thus the property subject to the taxable power of appointment will be includible in the gross estate of the beneficiary or donee spouse unless it has been dissipated in the interval.

For the purposes of the estate tax, the same principles underlying the marital deduction as to powers of appointment are also applicable to proceeds of insurance on the life of the decedent. The marital deduction may be obtained if under the terms of the policy the surviving spouse is entitled to receive such proceeds in annual or more frequent installments, with the right to designate her estate or other persons as the beneficiary of the unpaid balance of such proceeds.

* * * * *

S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., pp. 2-4, 7-13, 15-18 (1948-1 Cum. Bull. 331, 332-333, 335-344):

[p. 2]

Subpart 2—Marital Deduction for Bequests, Etc., to Spouse

Section 361. Marital Deduction

This section amends section 812 of the Code, relating to deductions in computing the net estate of a citizen or resident of the United States, by adding a new subsection, designated (e), providing for a so-called marital deduction, applicable with respect to estates of decedent dying after the date of enactment of the bill. The deduction is not allowed in computing the net estate of a nonresident not a citizen of the United States. In general, under this new subsection a deduction is allowed for an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse but the aggregate amount of such deductions is limited to 50 per cent of the value of the adjusted gross estate. There are, however, certain important qualifications and limitations, which are discussed below.

Sec. 812(e)(1), (3), and (4). Interest in Property Passing from the Decedent to His Surviving Spouse

Subparagraph (A) of section 812(e)(1) is the basic rule under which the marital deduction is allowed. Under this rule a deduction is allowed for an amount equal to the value of any interest in property, which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the decedent's gross estate.

The concept of the passing of an interest in property from the decedent as used in section 812(e) is expressed in the definition in paragraph (3) of section 812(e). Such paragraph (3) defines as so passing, interests which commonly would be considered as passing from the decedent, namely, interests bequeathed, devised, or transferred by the decedent or inherited from the decedent, or the dower or curtesy [p. 3] interest (or statutory interest in lieu thereof) of the decedent's surviving spouse. * * *

The definition of an interest passing from the decedent is broad enough to cover all the interests included in determining the value of the decedent's gross estate under the various subsections of section 811 of the Code. The definition also applies in the application of all of the provisions of section 812(e) (in addition to its application in paragraph (1) (A)), and because of such application, as will be explained later, may cover interests other than those included in determining the value of the decedent's gross estate.

* * * * *

[p. 4]

The terms "interest" and "property," as used in section 812(e), have separate and distinct meanings. The term "property" is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership. The term "interest" refers to the extent of ownership, that is, to the estate or the quality and quantum of ownership by the surviving spouse or other person, of particular property. For example, if the surviving spouse is specifically devised an estate for her life in a farm, the "interest" passing to her is the life estate, and the "property" in which such interest exists is the farm. Generally the property in which any person is considered as

having an interest is the property out of which, or the proceeds of which, such interest may be satisfied. Thus, in the case of a bequest, devise, or transfer of an interest which may be satisfied out of, or with the proceeds of, any property of the decedent's general estate or of a trust, the interest so bequeathed, devised, or transferred is an interest in any and all of such property. If the decedent's general estate or the trust consists of assets which are themselves interests in property (such as leases), the interest so bequeathed, devised, or transferred is an interest in such property.

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[p. 7]

SEC. 812(e)(1)(B) AND (C). NATURE OF INTEREST PASSING; TERMINABLE INTEREST RULE

Subparagraph (B) of section (e)(1) disallows the marital deduction with respect to certain terminable interests. Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, the interest passing to the surviving spouse will terminate or fail, the marital deduction will be disallowed under such subparagraph (B) if the conditions of clauses (i) and (ii), or of clause (iii) of such subparagraph are met. It is not necessary under such subparagraph (B) that the contingency or event must occur or fail to occur in order to make the interest terminable. Thus a terminable interest under such subparagraph includes an interest bequeathed to the surviving spouse as long as she resides in Washington, D. C. On the other hand, it includes interests which will in all events terminate, such as an estate for the life of the surviving spouse.

Subparagraph (B) is intended to be all-encompass-

ing with respect to various kinds of contingencies and conditions. Thus, it is immaterial whether the interest passing to the surviving spouse is considered as a vested interest subject to divestment or as a contingent interest. Subparagraph (B) applies whether the terms of the instrument or the theory of their application are conceived as creating a future interest which may fail to ripen or vest or as creating a present interest which may terminate. The occurrence of a contingency includes the ending of a condition. Thus, an interest given to the surviving spouse as long as she remains unmarried is a terminable interest.

* * * * *

[p. 8].

As previously stated, it is necessary for the purposes of section 812(e)(1) to distinguish between an interest in property and the property in which such interest is an interest. Thus, if the decedent devises Blackacre to his wife for life with remainder to X, then X has an interest in the property (Blackacre) in which the surviving spouse has an interest. If the principal value of Blackacre was a coal mine which may be expected to be exhausted during the surviving spouse's life, nevertheless both the surviving spouse and X have an interest in the property, which is Blackacre. If the decedent devises Blackacre to his son in fee but subject to a charge on the rents of Blackacre in favor of his surviving spouse for her life, the surviving spouse and the son have an interest in the same property (Blackacre). In the case of a trust or fund, the income beneficiaries and the persons who may receive any part of the corpus have an interest in the property represented by the assets of the trust or fund as of the date of the decedent's death.

On the other hand, subparagraph (B) does not apply merely because another person has an interest in property in which the surviving spouse has an interest. There is no need to apply such subparagraph unless the interest passing to the surviving spouse is a terminable interest. Thus, if the decedent by his will devises Blackacre to X for life with the remainder to his surviving spouse, subparagraph (B) is not applicable inasmuch as the interest passing to the surviving spouse is not a terminable interest. Similarly, if the decedent by his will devises Blackacre to his wife and son as tenants in common, the marital deduction is allowed, since the surviving spouse's interest is not a terminable interest.

Clause (i) of subparagraph (B) applies only if an interest in the property (in which the surviving spouse's terminable interest is an interest) passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse or her estate. It is not necessary, however, for the interest so passing to another person to pass at the same time as the interest passing to the surviving spouse. An interest which passes to the estate of the surviving spouse will not cause the disallowance of the deduction, but an interest which passes from the decedent to the heirs of such spouse by purchase where the State law does not give effect to the rule in Shelley's case, is an interest passing to persons other than the surviving spouse for the purposes of clauses (i) and (ii).

Clause (ii) of subparagraph (B) applies only if, by reason of the passing of an interest described in clause (i), such other person (or his heirs or assigns) may possess or enjoy any part of the property after the termination or failure of the terminable interest

passing to the surviving spouse in the same property. The term "possess or enjoy any part of such property" is intended to be broadly construed. It is immaterial under this provision whether such other person possessed or enjoyed any part of the property prior to the termination of the interest of the surviving spouse. Thus, as long as such other person may possess or enjoy any part of the property after the termination of the surviving spouse's interest, clause (ii) applies even though such possession or enjoyment is a continuation from a time prior to such termination.

* * * * *

[p. 9]

The application of clauses (i) and (ii) is further illustrated by the following examples:

* * * * *

[p. 10]

Example (2). The decedent by his will devised Blackacre to his wife and daughter as joint tenants. Both the wife and daughter have terminable interests in the same property, Blackacre. The daughter may (if she survives the wife) possess or enjoy such property after the termination of the wife's interest. Accordingly, no marital deduction is allowed with respect to the interest passing to the surviving spouse. It is immaterial that the daughter may not possess or enjoy all of Blackacre in the event of a severance of the joint interest. It is sufficient under clause (ii) that any part of the property may (by any possibility) be possessed or enjoyed by the daughter after the termination or failure of the wife's interest. Similarly, if the property were bequeathed in trust for the joint benefit of the wife and daughter with the corpus passing to the survivor, no marital deduction would be allowed. The daughter, by surviving

the spouse, may possess or enjoy the property after the termination of the spouse's interest.

In determining whether an interest in property is a terminable interest and whether the conditions of clauses (i) and (ii) are met, the situation is viewed as at the date of the decedent's death, although effect must be given to interests which have passed prior to the decedent's death. * * *

*   *   *   *   *

[p. 12]

Clause (ii) of subparagraph (B) applies if any person (other than the surviving spouse) or his heirs or assigns may by any possible circumstances under the terms of the bequest possess or enjoy any part of the property in which the surviving spouse's interest is an interest. * * *

In the case of certain property which is terminable, a marital deduction may be allowed, even though clause (i) applies, as long as clause (ii) does not apply. Thus, if the decedent bequeaths all the interest he ever had in a patent to his wife and daughter as tenants in common, the marital deduction is allowed with respect to the interest of the wife in the patent. If, however, the patent were bequeathed to them for their joint lives and then to the survivor, the marital deduction would not be allowed.

The same principles apply in the case of insurance proceeds and annuity contracts, as illustrated by the following examples:

Example (1). The entire proceeds of an insurance policy on the life of the decedent are payable to the surviving spouse and the value of such proceeds is included in determining the value of the gross estate. A marital deduction is allowed with respect to the value of the proceeds because no person other than the surviving spouse has an interest in the proceeds.

The result will be the same whether such proceeds are payable in a lump sum; are payable in installments to the surviving spouse, her heirs, or assigns, for a term; or are payable to the surviving spouse for her life with no refund of the undistributed proceeds or with such a refund to her estate. It is also immaterial whether any such mode of payment is determined by an option exercised by the decedent or exercised by the surviving spouse.

Example (2). The decedent during his lifetime purchased an annuity contract under which the annuity was payable during his life and then to his spouse during her life if she survived him. The value of the interest of the decedent's surviving spouse in such contract at the death of the decedent is included in determining the value of his gross estate. A marital deduction is allowed with [p. 13] respect to the value of such interest so passing to the decedent's surviving spouse inasmuch as no other person has an interest in the contract. If upon the death of the surviving spouse the annuity payments were to continue for a term to her estate, or the undistributed portion thereof was to be paid to her estate, the deduction is nevertheless allowable with respect to such entire interest. If, however, upon the death of the surviving spouse, the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person, no marital deduction is allowable inasmuch as an interest passed from the decedent to such other person.

A marital deduction is also disallowed for the interest passing to the surviving spouse as an income beneficiary or annuitant under a trust in which other persons have an interest, except as provided in subparagraph (F) of section 812(e)(1).

Clause (iii) disallows the marital deduction in

cases where pursuant to the decedent's direction terminable interests are to be acquired for the surviving spouse. Thus, under this provision, if the decedent directs the executor of his estate to purchase an annuity contract for the decedent's surviving spouse for a term of years or for her life, no marital deduction is allowed for the interest so passing to the surviving spouse. In such a case it is immaterial whether or not other persons have, under clauses (i) and (ii), an interest in the contract. It is also immaterial whether the decedent (in addition to directing the purchase of the annuity contract) designated or did not designate the assets to be used for the purchase. Clause (iii) also applies to the acquisition by a trustee, at the direction of the decedent, of a terminable interest for the surviving spouse.

* * * * *

[p. 15]

SEC. 812(e)(1)(D), (E), (F) AND (G). EXCEPTIONS TO THE TERMINABLE INTEREST RULE.

* * * * *

[p. 16]

Subparagraph (F) of section 812(e)(1) also provides an exception to the terminable interest provisions of subparagraph (B) of such section. This exception is for the purpose of allowing the marital deduction in the case of certain trusts where the surviving spouse has a power of appointment. The other provisions of section 812(e)(1) are still applicable generally to interests passing to the surviving spouse in trust. * * *.

The provisions of subparagraph (F) of section 812(e)(1) under the bill as it passed the House have been expanded in your committee bill. These provisions have the effect of allowing a marital deduction with respect to the value of property transferred

in trust by or at the direction of the decedent where the surviving spouse, by reason of her right to the income and a power of appointment, is the virtual owner of the property. This provision is designed to allow the marital deduction for such cases where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse.

In order for the interest in property transferred in trust to qualify for a marital deduction under subparagraph (F), the following conditions must be met:

* * * * *

[p. 18]

Subparagraph (G) of section 812(e)(1), which was not contained in the bill as passed by the House, also provides an exception to the terminable interest provisions of subparagraph (B) of section 812(e)(1). This exception is for the purpose of allowing the marital deduction in the case of proceeds of life insurance upon the life of the decedent where the surviving spouse is entitled to installments of the proceeds and has the same type of power possessed by the surviving spouse in the case of a trust to which subparagraph (F) applies. Subparagraph (G) applies only if the proceeds of the insurance are receivable in installments, commencing within 1 year after the decedent's death. The amounts payable to the surviving spouse must be installments which have the effect of reducing during her lifetime the aggregate proceeds of the policy available for future payments.

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SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1960.

Edward J. Meyer, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 21, 1960.]

Mr. Justice Whittaker delivered the opinion of the Court.

Petitioners, who are executors of the estate of Albert F. Meyer, brought this suit to recover an alleged overpayment of federal estate taxes and the District Court granted the relief asked. 166 F. Supp. 629. The Court of Appeals reversed, 275 F. 2d 83, and we granted the executors' petition for certiorari because of a conflict of decisions in the circuits. Cf. *In re Reilly's Estate*, 239 F. 2d 797, decided by the Court of Appeals for the Third Circuit.

Two policies of life insurance are involved,[1] but since they are in all material respects identical, we need deal with only one of them. The policy obligated the insurer to pay a death benefit of $25,187.50, and that sum was included by the executors in the federal estate tax return and the tax thereon was paid. The decedent had selected an optional mode of settlement which provided for the payment of equal monthly installments to his wife for her life, with 240 installments guaranteed, and further provided that if the wife should die before receiving the 240 installments his daughter would receive the remainder

[1] One of the policies was issued by Northwestern Mutual Life Insurance Company in the amount of $25,187.50, and the other was issued by John Hancock Mutual Life Insurance Company in the amount of $5,019.60.

of them; but if both the wife and the daughter died before receiving the 240 installments the commuted value of those unpaid was to be paid in one sum to the estate of the last one of them to die.

Of the total proceeds of the policy of $25,187.50, the insurer determined that $17,956.41 was necessary to fund the 240 monthly payments to the wife, the daughter, or to the estate of the last survivor of them, and that the remaining $7,231.09 was necessary to fund the monthly payments to the wife so long as she might live beyond the 240 months. Accordingly, the insurer made such entries on its books.

Thereafter petitioners, as executors, timely filed a claim for refund of the amount of the tax paid upon the $7,231.09 which the insurer had shown upon its books as necessary to fund the monthly payments to the wife for her actuarial expectancy beyond the 240 months certain, on the theory that the insurer's treatment of that sum on its books created a separate "property" or fund payable to the wife alone, and hence it qualified for the marital deduction under § 812 (e)(1) of the Internal Revenue Code of 1939.[2] The claim was denied, and this suit was brought to recover the tax that had been paid on that sum.

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[2] Section 812 (e) provides in relevant part:

"(1) *Allowance of marital deduction.*

"(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail. No deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth)

Petitioners correctly concede that if the policy constitutes but one "property," within the meaning of the statute,[3] it would not qualify for the marital deduction because the wife's interest in it would be a "terminable" one, within the meaning of the statute, inasmuch as the wife may die before receipt of the 240 guaranteed installments, in which event the unpaid ones must go to the daughter if then living. They concede, too, that the $17,956.41, shown on the insurer's books as necessary to fund the monthly payments for the 240 months certain, does not qualify for the marital deduction for the same reasons. But they contend that, although the policy made no provision therefor, the insurer's bookkeeping entries constituted a real division of the insurance proceeds into, and created, two "properties"—one of $17,956.41 and the other of $7,231.09—and that the latter qualifies for the marital deduction under the statute because it is payable, if at all, only to the wife—during her lifetime beyond the 240 months—and no other person has any interest in it.

Whether a policy of life insurance may create several "properties" or funds, either terminable or nonterminable or both, we need not decide, for we think the policy here

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from the decedent to any person other than such surviving spouse (or the estate of such persons); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ."

[3] "The terms 'interest' and 'property,' as used in section 812 (e) have separate and distinct meanings. The term 'property' is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership. The term 'interest' refers to the extent of ownership, that is, to the estate or the quality and quantum of ownership by the surviving spouse or other person, of particular property." S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4.

involved constituted only one property, and made only so much of its proceeds payable to the wife as she might live to receive in equal monthly installments, and made any guaranteed balance payable to the daughter. Hence, under the terms of the policy, the "interest passing to the surviving spouse [may] terminate or fail" and a "person other than [the] surviving spouse . . . may possess or enjoy [a] part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ." Therefore the policy and its proceeds—considered apart from petitioners' claim that the insurer's bookkeeping division of the proceeds of the policy into two parts created two "properties"—are disqualified for the marital deduction by the express provisions of § 812 (e)(1)(B) of the Internal Revenue Code of 1939. The legislative history of the section further supports and compels this conclusion. Illustrating applications of the terminable interest rule, the Senate Committee Report gave an example that is in no relevant way distinguishable from this case,[4] and makes it very clear that the

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[4] "*Example (2).* The decedent during his lifetime purchased an annuity contract under which the annuity was payable during his life and then to his spouse during her life if she survived him. The value of the interest of decedent's surviving spouse in such contract at the death of the decedent is included in determining the value of his gross estate. A marital deduction is allowed with respect to the value of such interest so passing to the decedent's surviving spouse inasmuch as no other person has an interest in the contract. If upon the death of the surviving spouse the annuity payments were to continue for a term to her estate, or the undistributed portion thereof was to be paid to her estate, the deduction is nevertheless allowable with respect to such entire interest. *If, however, upon the death of the surviving spouse the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person, no marital deduction is allowable inasmuch as an interest passed from the decedent to such other person.*" (Emphasis added.) S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 12.

marital deduction is not allowable in the case of an annuity for the surviving spouse for life if "upon the death of the surviving spouse the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person . . . ."

We think petitioners' argument—that the insurer's bookkeeping division of the proceeds of the policy into two parts created two properties—cannot withstand the provisions of the policy and the actual facts respecting the insurer's bookkeeping division of its proceeds, under the clear terms of the statute and its legislative history. The policy made no provision for the creation of two separate properties—one a property sufficient to provide payments for 240 months, to the wife while she lived and any remainder to the daughter, and another property sufficient to provide an annuity to the wife for the period of her actuarial expectancy beyond the 240 months—and no such separate properties were in fact created. The allocations made were merely actuarial ones—mere bookkeeping entries—made by the insurer on its own books for its own convenience after the insured, the other party to the contract, had died. The wife and the daughter were, respectively, primary and contingent beneficiaries *of the policy* alone. Neither of them had any title to, nor right to receive, any special fund, and indeed none was actually created. The bookkeeping entries made by the insurer no more created or measured their rights than the insurer's erasure of those entries—which it was free to make at any time—would destroy their rights. Their rights derive solely from the policy. It, not the insurer's bookkeeping entries, created and constitutes the property involved. Any action by the beneficiaries to enforce their rights against the insurer would have to be upon the policy, not upon the entries the insurer had made on its books for its own actuarial information and convenience. Nor would

exhaustion of the sum of those entries constitute any defense to the insurer against the claim of either beneficiary for amounts due her under the policy.

The proceeds of the policy were not payable to the wife (or to her estate or appointee) alone and at all events; but were payable in monthly installments to her for life, and if any obligation under the policy remained undischarged at her death it was payable to the daughter if living or, if not, to the estate of the last of them to die. It follows that the "interest passing to the surviving spouse [may] terminate or fail" and that a "person other than [the] surviving spouse . . . may possess or enjoy [a] part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ." and hence the property is disqualified for the marital deduction by the express provisions of § 812 (e)(1)(B) of the Internal Revenue Code of 1939.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1960.

Edward J. Meyer, et al., Petitioners, v. United States	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 21, 1960.]

Mr. Justice Douglas, with whom Mr. Justice Clark and Mr. Justice Brennan concur, dissenting.

The decedent had two life insurance policies in two separate companies; and each provided for the payment of the proceeds in 20 annual instalments by monthly payments to decedent's wife, Marion E. Meyer, if living and thereafter during her lifetime. If the wife was not living at decedent's death, the instalments were to be paid to a daughter. If the wife died after decedent and before payment in full of the instalments, any remaining instalments were to be payable to the daughter. If the wife lived beyond the 20 years, she would be entitled to like monthly payments for her life. Decedent was survived by his wife and daughter, the wife being then 42 years old.

The insurance companies calculated the sums necessary to provide the designated monthly payments for 20 years: \$17,956.41 in the case of one policy and \$4,012.24 in case of the other. They then computed the amount necessary to provide a monthly income to the wife in the event she lived beyond the 20-year period: \$7,231.09 for one policy; \$1,007.36 for the other.

Neither of the policies provided (and decedent did not request) that there be any segregation of the proceeds between the amounts computable for the term certain

and for funding of the contingent life annuity.[1] The amounts required to provide monthly payments for 20 years—$17,956.41 and $4,012.24—were not claimed as marital deductions. This controversy concerns only the amount needed to fund the contingent life annuities of the wife—$7,231.09 plus $1,007.36, or $8,238.45 which the executors claim as a marital deduction.

Concededly the amount necessary to make the 20-year payments does not qualify as a marital deduction because it may "terminate or fail" within the meaning of the Code,[2] the daughter being entitled to any remaining payments during that term should the wife die before it terminated. The daughter, however, has no *interest* in the annuities payable beyond the 20-year period. And it seems to me

[1] It was said, however, on oral argument the insurance companies maintained for their own records separate accounts as to the 20-year monthly income provisions and the contingent life annuity of the wife, without any segregation of funds.

[2] Section 812 (e), I. R. C., 1939, as added by Revenue Act of 1948, § 361, 62 Stat. 110, 117, provides in relevant part:

"(1) *Allowance of marital deduction.*

"(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ."

that the wife's "interest" in that part of the insurance contracts does not "terminate or fail" within the meaning of § 812 (e)(1)(B).[3]

If the decedent had taken out *one group of policies* to pay instalments for 20 years to his wife or, if she died within that period, to his daughter, and *another group of policies* to pay instalments to his wife for life is she lived more than 20 years, the former would be nondeductible but the latter would qualify for the marital deduction.[4] Does then the continuation of the two types of insurance in one policy change the result? The Government maintains that it does because in its view the entire insurance proceeds of each policy are a single "property" as that term is used in the statute; and the Court so holds. Yet, with all deference, that conclusion is wide of the mark.

The Senate Report states that terminable *interests* include all *interests* that are subject to contingencies and conditions.[5] Yet these contingencies and conditions are not all inclusive. They do not include the death of the transferee. And, as I shall show, contingencies of the kind we have here are not included.

The Court, with all deference, errs in making its decision turn on whether the wife's *interest* after the 20-year term is a separate "property" within the meaning of the statute. The ruling of the Court is on a statutory pro-

[3] See note 2, *supra*.

[4] The Court of Appeals in *In re Reilly, supra*, correctly noted that the purpose of the marital deduction under this Act was "to make more nearly uniform the tax treatment of married persons in community property and noncommunity property states." *Id.*, at 799. The assets not taxable in the estate of the first spouse to die may be taxed at the death of the survivor. In other words, the property in the marital community is subject to the tax only once in the estate of either.

[5] S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 7.

vision that does not exist. Under the statute the question is not whether "property" is terminable; it is whether an "interest" is terminable. The statute indeed draws a marked distinction between "property" and "interest."[6] Section 812 (e)(1)(A) speaks not of "property" but of any "interest" in property. Section 812 (e)(1)(B) speaks only of an "interest passing to the surviving spouse" that will "terminate or fail." The statute at these points is concerned with "interest" in property not with "property." Yet the Court, disregarding the statutory scheme, looks only to "property" and finding but one insurance policy denies the deduction.

Plainly there may be more than one "interest" in a single "property." A deduction is not denied merely because the surviving spouse and someone else each have an "interest" in the same "property." S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 8. The Senate Committee gave several examples: ". . . if the decedent by his will devises Blackacre to his wife and son as tenants in common, the marital deduction is allowed, since the surviving spouse's interest is not a terminable one."[7]

There seems to me to be a like separation of *interests* in the present case. These insurance policies created, of course, no fund or *res*. The sum of $21,968.65 representing the wife's terminable *interest* and the $8,238.45 representing her other *interest* were, of course, no more segregated in the insurance companies' assets than a customer's checking account is segregated in a commercial bank.

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[6] "The terms 'interest' and 'property,' as used in section 812 (e) have separate and distinct meanings. The term 'property' is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership. The term 'interest' refers to the extent of ownership, that is, to the estate or the quality and quantum of ownership by the surviving spouse or other person, of particular property." S. Rep., *supra*, note 3, Pt. 2, p. 4.

[7] *Id.*, at 8.

Yet that seems immaterial. Each represented a chose in action. The wife or daughter, as the case might be, could sue for the one during the 20-year period. Only the wife could enforce the claim here in question.

That the proceeds of one life insurance policy may create two or more "interests" for purposes of the estate tax is implicit in the Senate Report. Thus one example of a marital deduction that is given is an annuity payable to the decedent during his life and to his spouse during her life if she survived him.

> "The decedent during his lifetime purchased an annuity contract under which the annuity was payable during his life and then to his spouse during her life if she survived him. The value of the interest of the decedent's surviving spouse in such contract at the death of the decedent is included in determining the value of his gross estate. A marital deduction is allowed with respect to the value of such interest so passing to the decedent's surviving spouse inasmuch as no other person has an interest in the contract. If upon the death of the surviving spouse the annuity payments were to continue for a term to her estate, or the undistributed portion thereof was to be paid to her estate, the deduction is nevertheless allowable with respect to such entire interest. If, however, upon the death of the surviving spouse, the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person, no marital deduction is allowable inasmuch as an interest passed from the decedent to such other person." *Id.*, pp. 12–13.

The last sentence of the foregoing quotation, on which the Court relies, describes with accuracy the terminable "interest" of the wife in that part of the annuity payable during the 20-year period after the death of the decedent.

It has no relevancy to the "interest" with which we are here concerned, *viz.*, the instalments payable after that 20-year period.

My conclusion is that where the "interest" that accrues to the surviving spouse is, as here, shared with no one else and is subject to no termination except her own death, it qualifies for a marital deduction under this statute, even though another "interest" of hers in the same annuity contract would not qualify.